

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Olas Carayannis	Team: Squad #10	CCRB Case #: 201503997	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 05/12/2015 6:14 PM	Location of Incident: 502 West 167 Street	Precinct: 33	18 Mo. SOL 11/12/2016	EO SOL 11/12/2016	
Date/Time CV Reported Tue, 05/12/2015 9:58 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 05/19/2015 8:46 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Elvin Gomez	09911	938582	033 PCT
2. POM Michael Martinez	02150	942136	033 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Michael Martinez	Abuse: PO Michael Martinez drew his gun.	
B.POM Michael Martinez	Abuse: PO Michael Martinez stopped § 87(2)(b)	
C.POM Michael Martinez	Abuse: PO Michael Martinez frisked § 87(2)(b)	
D.POM Michael Martinez	Abuse: PO Michael Martinez searched § 87(2)(b)	
E.POM Elvin Gomez	Abuse: PO Elvin Gomez issued § 87(2)(b) a summons.	
§ 87(2)(g), § 87(4-b)		

### Case Summary

On May 12, 2015, at approximately 6:15 p.m., § 87(2)(b) entered a store located at 502 West 167<sup>th</sup> Street in Manhattan. While § 87(2)(b) was in the store, PO Michael Martinez walked into the store with his gun drawn (**Allegation A**). PO Martinez told § 87(2)(b) not to move. § 87(2)(b) cooperated and put his hands up. PO Martinez told § 87(2)(b) to turn around and turned him around such that § 87(2)(b) was facing a store shelf. PO Martinez then frisked and searched § 87(2)(b) (**Allegations B, C, and D**). While PO Martinez interacted with § 87(2)(b) another officer, PO Elvin Gomez, arrived in the store. PO Martinez placed § 87(2)(b) in handcuffs and took him out of the store. Outside of 502 West 167<sup>th</sup> Street, PO Gomez began searching and moving garbage bags on the street, but did not find anything. A crowd started to form around the officers and § 87(2)(b) at which point the officers placed § 87(2)(b) into their police vehicle and took him to the 33<sup>rd</sup> precinct stationhouse where he was released with a disorderly conduct summons (**Allegation E**) (Board Review 01). § 87(4-b) § 87(2)(g)

IAB initially investigated this complaint, but it was forwarded to the Office of the Chief of Department.

There are two videos of the incident which can be found in Board Review 03 and Board Review 04. One video, Board Review 03, was captured on a cell phone by § 87(2)(b) § 87(2)(b) who witnessed the incident after the officers removed § 87(2)(b) from the store located at 502 West 167<sup>th</sup> Street. Although the video was captured by § 87(2)(b) it was provided to the investigation by § 87(2)(b). The other video, Board Review 04, was taken via security footage from inside of 502 West 167<sup>th</sup> Street.

### Mediation, Civil, and Criminal Histories

This case was not suitable for mediation as § 87(2)(b) was planning on filing a lawsuit in regards to the incident. A notice of claim inquiry was submitted and will be added to the case file upon its receipt (Board Review 16). § 87(2)(b) [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

On July 9, 2015, § 87(2)(b) stated that his disorderly conduct summons had been dismissed on § 87(2)(b) Board Review 17).

### Civilian and Officer CCRB Histories

- § 87(2)(b)
- PO Michael Martinez has been a member of the NYPD for nine years and has had 18 previous CCRB allegations made against him, none of which have been substantiated. Two stop allegations, one gun drawn allegation, and one search allegation have previously been made against PO Martinez.
- PO Elvin Gomez has been a member of the NYPD for ten years and has had 21 previous CCRB allegations made against him, none of which have been substantiated. § 87(2)(g)

### Officers Not Interviewed

In their CCRB testimonies, both PO Martinez and PO Gomez stated that additional officers were called to the scene once a crowd had formed on West 167<sup>th</sup> Street while § 87(2)(b) was in custody. These officers were not interviewed as they were called to the scene after the allegations took place.

### Findings and Recommendations

#### Allegations Not Pleaded

§ 87(2)(b) alleged that PO Martinez pointed his gun directly at him when he entered the store located at 502 West 167<sup>th</sup> Street. However, security footage from inside of 502 West 167<sup>th</sup> Street shows that,

although PO Martinez did enter the store with his gun drawn, his gun was never pointed at § 87(2)(b)

§ 87(2)(g)

During a phone statement with § 87(2)(b) § 87(2)(b) alleged that an officer told the crowd that formed around § 87(2)(b) to “get the fuck up” and go to the other side of the street. § 87(2)(b) also alleged that an officer stated at some point, “I don’t give a fuck if they’re recording us,” in regards to bystanders filming the incident (Board Review 02). § 87(2)(b) s allegations differ in nature from § 87(2)(b) s. During his CCRB testimony, § 87(2)(b) did not allege that the officers used profanity. Additionally, in her phone statement, § 87(2)(b) did not provide sufficient identifying information in order to ascertain which officer made the statements. § 87(2)(b) missed two scheduled interviews with the CCRB and did not provide a verified statement to the investigation. Finally, both PO Martinez and PO Gomez denied the specific allegations. § 87(2)(g)

§ 87(2)(b) alleged that an officer told § 87(2)(b) “You could come in the car, too.” § 87(2)(b) did not provide any identifying information as to which officer said this to § 87(2)(b) During her phone statement, § 87(2)(b) stated that the officers did not interact with her, though she told the officers that what they were doing was “unjust.” § 87(2)(g)

#### **Allegation A – Abuse of Authority: PO Michael Martinez drew his gun.**

It is undisputed that, upon entering 502 West 167<sup>th</sup> Street, PO Michael Martinez drew his gun. § 87(2)(b) stated, when he first saw PO Martinez inside of 502 West 167<sup>th</sup> Street, PO Martinez had his gun pointed directly at him (Board Review 01). PO Martinez contradicted § 87(2)(b) s account of the incident, stating that he drew his gun and held it near his right shoulder while he was in the entrance of the bodega upon seeing § 87(2)(b) turn around very quickly and put his hands towards his waist area (Board Review 06).

None of the witnesses were cooperative with the investigation (Board Review 19)

PO Martinez stated that 502 West 167<sup>th</sup> Street is a known “drug prone” location, and that the individuals that § 87(2)(b) was initially standing with outside of a nearby residential building were known drug dealers. PO Martinez suspected § 87(2)(b) of “engaging in narcotic activity” because when § 87(2)(b) saw the officers, he attempted to open the door of the residential building he was standing in front of, but was unable to get inside of the building. He then turned around and walked down the block and walked behind a van. PO Martinez could see § 87(2)(b) “moving around,” but could not tell what he was doing behind the van. PO Gomez stated that there was a pile of garbage bags behind the van and he heard garbage bags being moved when § 87(2)(b) walked behind the van. § 87(2)(b) then changed directions again and walked back up West 167<sup>th</sup> Street, where he went into the store located at 502 West 167<sup>th</sup> Street. PO Martinez stated that § 87(2)(b) s change in direction indicated that he was trying to “get rid of something.” PO Martinez did not indicate seeing any specific bulges on § 87(2)(b) stating that § 87(2)(b) was wearing baggy clothing at the time. PO Martinez drew his firearm because he feared for his safety when he walked into the store because the store “works with the drugs dealers,” and he knew this because they “get multiple calls for drugs being hidden inside of the bodega and drugs sales in front of it” so PO Martinez did not know “if they had weapons hidden in there” or “if § 87(2)(b) was hiding a weapon.”

Security video from the store located at 502 West 167<sup>th</sup> Street shows that at 00:35 seconds into the video, PO Martinez draws his gun prior to entering the store. PO Martinez holds the gun near his right side as he

walks into the store and gestures to § 87(2)(b) using his left hand, which is extended out in front of his body. PO Martinez does not point his firearm directly at § 87(2)(b) but rather holds it at a downward angle. At no point during the encounter does § 87(2)(b) turn around very quickly or make any gestures towards his waist area or midsection (Board Review 04).

*Police Department vs. Gilner* (OATH Index No.955/00) states that an officer is permitted to draw and point his/her firearm at another person if he/she has reasonable fear for his/her own or another's safety (Board Review 15).

§ 87(2)(g)

**Allegation B – Abuse of Authority: PO Michael Martinez stopped § 87(2)(b)**

**Allegation C – Abuse of Authority: PO Michael Martinez frisked § 87(2)(b)**

**Allegation D – Abuse of Authority: PO Michael Martinez searched § 87(2)(b)**

Based upon the video evidence, it is undisputed that PO Michael Martinez stopped § 87(2)(b) and frisked and searched him inside of 502 West 167<sup>th</sup> Street. The circumstances surrounding the stop, frisk, and search of § 87(2)(b) are in dispute.

§ 87(2)(b) stated that while walking to his godson's building he shook hands with his friend § 87(2)(b) and then rang the bell to his godson's building. There was no answer so § 87(2)(b) left and entered a nearby store. § 87(2)(b) referenced making a "U turn" to go back inside the store after initially leaving the store without purchasing a soda and then stated that he made the "U turn" after leaving the store because it was "a little packed." None of the witnesses were cooperative with the investigation (Board Review 19).

PO Martinez and PO Gomez cited the following reasons for stopping § 87(2)(b) 1.) § 87(2)(b) was committing disorderly conduct, 2.) the officers believed § 87(2)(b) to be engaging in narcotics sales, and 3.) § 87(2)(b) turned around quickly and made movements towards his waist area upon PO Martinez's approach, prompting PO Martinez to point his weapon at § 87(2)(b) and stop him. It is clear, however, from the video that PO Martinez's weapon was drawn upon him entering 502 West 167<sup>th</sup> Street and that § 87(2)(b) did not turn around quickly or make any movements towards his waist area.

PO Martinez and PO Gomez stated that § 87(2)(b) was committing disorderly conduct by congregating with a group of individuals, blocking the sidewalk and the entry way to a residential building. According to PO Martinez, he observed § 87(2)(b) standing in front of a residential building, talking with and gesturing to a group of six to seven other individuals. PO Martinez "believ[ed]" he saw a woman try to get into the building, and maneuver around the group. PO Gomez corroborated that he observed § 87(2)(b) standing with five to seven individuals who appeared "calm." However, PO Gomez made no mention of a woman attempting to enter the building that the group was standing in front of.

PO Martinez stated that the area is a known "drug prone" location, and that the individuals that § 87(2)(b) was standing with were known drug dealers. However, PO Martinez had never seen § 87(2)(b) prior to the incident. PO Martinez believed § 87(2)(b) was "either there to buy" or "to make a drop off or a pick up money." PO Martinez was suspicious of § 87(2)(b) because he had a large empty book bag

on his back. PO Martinez knew the bag was empty because “it was pretty flat.” PO Martinez suspected § 87(2)(b) of “engaging in narcotic activity” because of his actions upon seeing the officers. PO Martinez stated that when § 87(2)(b) saw the officers, he became nervous and attempted to open the door of the building he was standing in front of, but was unable to get inside of the building. He then turned around and walked down the block and walked behind a van. PO Martinez could “partially” see § 87(2)(b) behind the van and could see him “moving around,” but could not tell what he was doing. PO Gomez stated that there was a pile of garbage bags behind the van and he heard garbage bags being moved when § 87(2)(b) walked behind the van. § 87(2)(b) then changed directions again and walked back up West 167<sup>th</sup> Street, where he went into the store located at 502 West 167<sup>th</sup> Street. PO Martinez stated that § 87(2)(b) s change in direction indicated that he was trying to “get rid of something.” PO Martinez did not indicate seeing any specific bulges on § 87(2)(b) at any point, stating that § 87(2)(b) was wearing baggy clothing at the time. When PO Martinez felt the cellphone in § 87(2)(b) s pocket during the frisk, he knew it was a cellphone based on its shape. He removed the cellphone from § 87(2)(b) s pocket as he wanted to verify it was a cellphone, and because he had seen a field intelligence bulletin which informed him that some cellphone-shaped objects could fire bullets.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:... he obstructs vehicular or pedestrian traffic, or congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse. N.Y. Penal Law § 240.20 (5)(6) (Board Review 14). “Something more than a mere inconvenience of pedestrians is required to support the charge” of disorderly conduct, *People v. Jones*, 9 NY3d 259 (2007), (Board Review 07). Thus, the mere act of standing in front of a building and possibly causing a minor inconvenience to one passing pedestrian does not constitute disorderly conduct.

Innocuous behavior alone will not generate reasonable suspicion for a stop and frisk, *People v. Debour*, 40 NY2d 210 (1976) (Board Review 08). An individual’s “presence in a ‘drug-prone and gun-prone’ location,” in addition to an individual’s “change in course after he noticed...police officers,” invokes the common law right to inquire, but does not raise the officers’ level of suspicion to a reasonable suspicion that said individual is involved in a crime, as required for a stop and frisk. *People v. Gerard*, 94 AD3d 592 (App. Div. 1<sup>st</sup> Dep’t. 2012) (Board Review 11). “[T]he mere act of ‘ducking’ behind [a] van...does not provide a sufficient nexus to conclude that said individual...” is engaging in criminal activity. The “...observation of an individual ducking down...might..., at most, [permit] a level one inquiry.” *People v. Ransom*, 46 Misc. 3d 1224A (Crim. Ct. Bronx Cty. 2015) (Board Review 10) “Where no more than a common-law right to inquire-exists, a frisk must be based upon a reasonable suspicion that the officers are in physical danger and the defendant poses a threat to their safety.” *People v. Stevenson*, 273 AD2d 826 (App. Div. 4<sup>th</sup> Dep’t. 2000) (Board Review 12). According to *People v. Robinson*, 125 A.D.2d 259 (App. Div. 1<sup>st</sup> Dept. 1986) (Board Review 20), where a visual observation or limited protective frisk reveals a bulge, that bulge must look or feel like a weapon before the officer is entitled to subject the detainee to a more intrusive search.

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation E – Abuse of Authority: PO Elvin Gomez issued § 87(2)(b) a summons.**

It is undisputed that PO Gomez issued § 87(2)(b) a disorderly conduct summons for congregating in front of a residential building with a group of six to seven other individuals.

§ 87(2)(g)

§ 87(4-b), § 87(2)(g)

Squad: 12

Investigator:	_____	<u>Nicholas Carayannis</u>	<u>August 17, 2015</u>
	Signature	Print	Date

Supervisor:	_____	_____	_____
	Title/Signature	Print	Date

Reviewer:	_____	_____	_____
	Title/Signature	Print	Date